

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CINDY BURTON,	§
Plaintiff,	§
	§
v.	§ CIVIL ACTION NO.
	§ 3:99-CV:0305-G
	§
WYETH-AYERST LABORATORIES	§
DIVISION OF AMERICAN HOME	§ ECF
PRODUCTS CORPORATION, ET AL.,	§
Defendants.	§

**PLAINTIFF'S RESPONSE TO DEFENDANT
WYETH'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff, Cindy Burton, responds to Defendant's motion for partial summary judgment, as follows:

1. Introduction

Wyeth has moved for partial summary judgment on three theories of liability: (1) Ms. Burton's claim of "exercise-induced" pulmonary arterial hypertension (PAH); (2) negligence *per se*; and (3) conspiracy. With regard to the last two grounds, Ms. Burton withdraws and abandons her claims for negligence *per se* and conspiracy. With regard to the first ground, Wyeth has failed to show its entitlement to summary judgment and fact issues remain. For that reason, the motion should be denied.

2. There is no merit in Wyeth's motion for partial summary judgment on "exercise-induced" PAH.

As a preliminary matter, Ms. Burton never made a claim for "exercise-induced" PAH. That is Wyeth's term. Wyeth uses the term because Ms. Burton's PAH is diagnosed on

exercise. Moreover, there are volumes of scientific studies that demonstrate that Wyeth's diet drugs cause PAH—and none of those studies makes the artificial distinction that Wyeth attempts to make in its motion.

In this case, there is no dispute that the medical and scientific community has reached a “consensus definition” of PAH. There is no dispute about this because even the Defendant's experts use that definition. That definition provides for a diagnosis on exercise, as Ms. Burton's diagnosis was. There is no dispute that Ms. Burton fits within the “consensus definition” of PAH. And, as stated, there are volumes of studies that conclude that PAH is caused by Ms. Burton's use of Wyeth's diet drugs. Those studies are reliable evidence of causation under *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997). Wyeth improperly attempts to “reanalyze” or “dissect” those studies to reach a different conclusion than the studies' authors. *Havner* rejects that approach. *Id.*

Thus, because there is sufficient evidence that Ms. Burton's PAH was caused by her ingestion of Wyeth's diet drugs, Wyeth's motion is without merit and should be denied.

CONCLUSION

Ms. Burton's claims for negligence *per se* and conspiracy—alleged by Ms. Burton's prior counsel—are withdrawn and abandoned. As is set forth in the accompanying brief, Wyeth's first ground for summary judgment—based on its “exercise-induced” distinction—is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2007, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following individuals:

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